E-discovery obligations in US product liability litigation

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IN-HOUSE LAWYERS HANDLING COMPLEX product liability litigation in the US are likely to have to deal with extensive discovery exercises. The plethora of electronic devices used by businesses these days means that costs of electronic discovery (e-discovery) can be significant and substantial resources are required to manage the process.

The German automotive manufacturer, Volkswagen AG, faced extensive pre-trial litigation and discovery in warranty extension litigation in the US before settlement was agreed. Cases do not need to even approach that magnitude to involve huge discovery costs.

Given the amount of electronically stored information in companies, even one-off cases require production of huge volumes of material, costing hundreds of thousands or even millions of euros. These costs arise from the need to preserve, collect, and review documents and electronically stored information prior to production.

If your company, its parent, subsidiary, or an affiliate does business in the US, then the possibility of being a party to litigation there and of having to produce documents and electronically stored information is a real risk. It does not matter that your company would not have to give such disclosure in litigation in the country that you are based in – what matters are the discovery rules in the US, which can be far reaching.

US LEGAL REQUIREMENTS

The Federal Rules of Civil Procedure – specifically, Rules 26 and 34 – govern discovery of documents and electronically stored information (ESI) in US federal courts and have been adopted with little or no modification in a majority of state courts. I t is provided that:

> 'Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defence.'

Further, it is provided that parties can require the production of documents and ESI 'in the responding party's possession, custody, or control' (Rules 26(b)(1) and 34(a)(1)).

Electronically stored information is defined broadly to include:

> '...writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations – stored in any medium from which information can be obtained' (Rule 34(a)(1)(A)).

This includes not only standard business applications, but also relevant content from social media applications such as Facebook and Twitter when they have been used to conduct company business.

Similarly, custody and control are defined broadly to include discoverable material in possession of a non-party, if the party to whom a request is made has the legal right to obtain the item – even if it has no copy.

In some instances courts have gone even further holding that a party must produce requested items if it has the practical ability to obtain the items from another, irrespective of the question of legal entitlement. For example, in *Prokosch v Catalina Lighting, Inc* [2000], a product liability case involving halogen lamps, the court directed the defendant that its document production obligations included documents it 'may not physically possess, but which it is capable of obtaining upon demand'.

The requirement to produce documents and electronically stored information in US litigation may be imposed even in light of the heightened protection for personal information throughout the EU. In *Societe Nationale Industrielle Aerospatiale v United States District Court* [1987], the US Supreme Court determined that the Federal Rules of Civil Procedure are not displaced by the Hague Convention on Private International Law, that provides a procedure for US litigants to obtain discovery from European sources. The Supreme Court said that the Hague Convention is a permissive supplement to the Federal Rules. So, while US trial courts are often receptive to efforts to protect personal information where possible, they may use *Aerospatiale* to reject foreign data protection laws as a bar to discovery demands made in US litigation.

PRESERVATION

Parties in US litigation are required to expend reasonable efforts to preserve potentially relevant evidence. This requirement applies to documents and electronically stored information. Accordingly, counsel must make reasonable efforts to identify employees who are likely to have potentially relevant information – sometimes called 'key players' or 'custodians' – and to also identify the sources of information that the custodians have access to. The possible sources of information are numerous and diverse. For electronically stored information alone they may include the employee's computer(s), personal network drive, shared network drive, company e-mail server, mobile devices, and removable media such as CDs, DVDs, and USB drives.

Effective preservation also requires counsel to know and understand how the company manages its information resources. This requires close co-ordination with the company's IT professionals on questions such as whether the company automatically deletes e-mail after a set period of time, whether the company uses an e-mail archive and how often the company recycles its disaster recovery backup tapes.

Several US courts have held that the preservation obligation involves not only notifying custodians of the need to preserve potentially relevant information, but also following up with the custodians and the company's IT professionals to be reasonably sure that evidence is in fact being preserved. Failure to comply with US preservation obligations can result in a wide variety of sanctions that can include fines, negative inference instructions to the jury, and in some instances, the dismissal of claims or defences. For example:

- in *Magana v Hyundai Motor Am* [2009] an $8m default judgment was entered in a product liability case against defendant automobile maker for its 'wilful and deliberate failure to comply with discovery'; and
- in *Harkabi v SanDisk Corp* [2010] the court imposed an adverse inference jury instruction in breach-of-contract action as sanction for defendant's failure to preserve and produce laptop data and e-mails.

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COLLECTION

The next step after preservation is to collect potentially responsive documents and electronically stored information from individual custodians and shared sources. This involves some type of interview with individual custodians, often in person or via web conference, and development of processes to collect in a forensically sound manner so that information, known as 'metadata' remains intact.

It is not unusual for an individual custodian to have five gigabytes or more of electronically stored information, not including data that may be available on shared network drives, or databases. What does that mean? The brief answer is that the number of documents or pages per gigabyte can vary widely. A high-quality colour photograph, for example, takes up more storage space than a document with simple text. E-mail messages typically require fewer pages than spreadsheets. After taking all of these variations into account, a standard estimate of average pages per gigabyte is 75,000, that means a custodian with five gigabytes of electronically stored information could have more than 350,000 pages of material. On top of that, of course, they may have paper documents in their office, an onsite storage area, or offsite storage.

LITIGATION SUPPORT VENDOR

In order to review large volumes of documents and electronically stored information efficiently, items can processed using specialist software. This typically requires the engagement of a litigation support vendor. While the basic role fulfilled by the vendor is straightforward and well established, the variety of services that vendors offer continues to blossom as a result of advances in technology and emphasis on reducing review costs. The way that vendors bundle their services and pricing can vary greatly. When interviewing a litigation support vendor, it is important to cover both their volume-based and hourly-based pricing.

To those inexperienced in the field of e-discovery, the terminology can sound bewildering: 'communication mapping', 'stem searching', 'fuzzy searching', 'concept searching', 'predictive coding', 'e-mail threading', 'near duplication' and 'concept clustering'. Essentially though they are all just tools for helping to identify relevant information and avoid duplication without recourse to traditional document by document review.

REVIEW

Nevertheless, for virtually all product liability cases of substantial size, a subset of items must be reviewed for responsiveness, confidentiality, data privacy, privilege, or some combination of the four. Counsel may also wish to apply issue tags to produced items. While the overall cost of review continues to decline, several speakers and commentators still refer to review as potentially the most expensive step in the discovery process.

PREPARATION TO CONTROL COSTS

To prepare for the possibility of having to produce documents and electronically stored information in the US, in-house counsel may want to consider the following:

- If your company, or an affiliate, has a US legal department, ask your colleagues there for a sample of the legal hold notice they use and discuss the procedures they follow in preserving documents and electronically stored information for litigation.

- If your US legal department has litigation experience, ask about collection procedures and litigation support vendors that they use.
- Be clear about the way e-mail is managed at your company. Are any auto-delete agents in place? Do users have the option to store e-mail on their hard drives or personal network drive?
- Capture a birds-eye view of your company's document management system and major databases.
- Know and understand your company's procedures for recycling disaster recovery media, and whether any disaster recovery data is retained permanently or indefinitely for any reason.
- Familiarise yourself with the basic services and pricing of leading litigation support vendors. Articles on the subject are plentiful, and vendors' websites can be informative. In addition, vendors will be happy to discuss their products and services over the phone, via web conference, or in person.
- Ask your outside counsel how they staff and co-ordinate reviews of documents and electronically stored information. Do they have substantial experience in this area? Has the firm purchased its own litigation support application? Alternatively, does the firm have a preferred litigation support vendor? Does the firm staff document reviews with contract attorneys, associates, or other staff members?

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These information-gathering efforts, while simple and straightforward, involve virtually no out-of-pocket costs and could result in dramatic savings if it is necessary for your company to make a major production in US litigation.

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